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ERISA - Fischer v. Philadelphia Electric Co.: The Third Circuit Seriously Considers the Fiduciary Duty to Disclose Potential Changes to an Employee Benefit Plan under ERISA

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I. INTRODUCTION

The employer that administers its employees' benefit plan or manages the assets of such a plan triggers fiduciary obligations for itself under the Employee Retirement Income Security Act of 1974 ("ERISA"). This employer owes a duty to deal fairly and honestly with plan participants and must "discharge [its] duties with respect to a plan solely in the interests of the plan participants and beneficiaries." Suppose that while administering the plan, the employer decides to increase the pension benefits that it provides to its employees upon retirement. This employer risks becoming the defendant in lawsuits filed by former employees who retired while the employer was deliberating over the possible increase. The disgruntled retirees may claim that the employer breached its fiduciary disclosure.


   [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.


2. 29 U.S.C. § 1104(a). For the express language of § 1104(a), see infra note 29. For a discussion of the general scope of the ERISA fiduciary duties, see infra notes 26-33 and accompanying text.

3. See Donald P. Carleen, Duty to Disclose Serious Consideration of Plan Changes, N.Y. L.J., Dec. 20, 1996, at 5 (providing hypothetical upon which textual scenario is based).

4. See id. (describing, in context of hypothetical, situation in which employer becomes defendant in lawsuits filed by former employees who retired while employer was considering potential plan amendments); see also Kurz v. Philadelphia Elec. Co., 994 F.2d 136, 138 (3d Cir. 1993) [hereinafter Kurz] (involving plaintiffs who retired before adoption of plan change but during period in which employer contemplated plan change); Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 132 (3d Cir. 1993) [hereinafter Fischer] (same).

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obligations under ERISA, asserting that they would not have retired had they known the employer was considering the plan change.\(^5\)

Nevertheless, the employer may seek to avoid disclosing its internal deliberations regarding potential plan changes for several reasons.\(^6\) For example, the employer may not want to confuse its employees or create false expectations by announcing potential plan changes that may never be adopted.\(^7\) Alternatively, the employer may be economically motivated to avoid disclosure of its internal deliberations regarding potential plan changes.\(^8\) For instance, the employer knows that few employees would elect to participate in a voluntary early retirement program if they discovered that the employer was considering the possibility of enhancing the benefits due under the program in the near future.\(^9\)

In light of the foregoing and within the context of the existing climate of increased fiduciary litigation under ERISA, courts have had to examine whether and to what extent ERISA contemplates a fiduciary duty to

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5. See Carleen, *supra* note 3, at 3 ("Some of these retirees claim that they did not ask whether a plan amendment was under consideration but that the company should have volunteered that fact. Other retirees claim that they did ask but that the company refused to say . . . . Still others claim that, when they asked, the company lied . . . ."). In *Fischer I*, one employee who retired less than two months before the defendant employer "seriously considered" implementing a plan change expressed his thoughts:

If I had only known of the retirement package I would have waited . . . .

[My family and] I had 41 years of dedicated services to [my employer]. . . . I feel that we should have been told of the sweetener . . . . I feel hurt and deceived that I was not given the opportunity [to take advantage] of the early retirement package.

*Fischer I*, 994 F.2d at 135.

6. See Carleen, *supra* note 3, at 3 (describing reasons for employers not to disclose their internal deliberations regarding potential plan changes).

7. See id. (discussing negative effects of disclosing potential plan changes that may never be adopted).

8. See id. (discussing economic reasons to avoid disclosure of internal deliberations regarding potential plan changes); see also Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?,* 54 U. Pitt. L. Rev. 979, 997 (1993) ("A business that for competitive reasons finds it necessary to reduce its workforce should not be prevented from pursuing a business plan under which an initial early retirement or severance pay plan will be improved if a sufficient number of employees do not elect to retire or terminate employment.").

9. See Carleen, *supra* note 3, at 3 (describing employers' motivations for not disclosing their internal deliberations); see also Bintz, *supra* note 8, at 997 (observing that if affirmative duty were imposed upon employers to disclose proposed plan changes, such plan changes would be impossible to implement). In one case, the United States Court of Appeals for the Second Circuit concluded, as a practical matter, that compelled disclosure in this situation would "impair the achievement of legitimate business goals" of the employer, such as making successively better offers of early retirement incentives in an effort to cause a voluntary reduction in force. Pocchia v. NYNEX Corp., 81 F.3d 275, 278-79 (2d Cir.), cert. denied, 117 S. Ct. 302 (1996). Likewise, the court noted that "[i]f fiduciaries were required to disclose such a business strategy, it would necessarily fail. Employees simply would not leave if they were informed that improved benefits were planned if workforce reductions were insufficient." *Id.* at 279 (citation omitted).
disclose information regarding potential plan changes to plan participants and beneficiaries that supplements its express reporting and disclosure rules. Although several courts of appeals have addressed this issue, few have articulated an intelligible standard for determining whether a fiduciary duty to disclose will be imposed in such circumstances. Conversely, in deciding Fischer v. Philadelphia Electric Co. ("Fischer I"), the United States Court of Appeals for the Third Circuit clearly imposed upon ERISA fiduciaries the duty to disclose plan changes that are under "serious consideration," but not yet adopted. In Fischer v. Philadelphia Electric Co. ("Fischer II"), the same court embellished this standard, setting forth its "serious consideration" formulation—a three-pronged test to determine whether and when such serious consideration has arisen in a particular situation.

This Casebrief addresses the Third Circuit's "serious consideration" formulation regarding the fiduciary duty to disclose potential changes to an employee benefit plan under ERISA. As background, Part II examines ERISA's regulatory scheme. Part II also discusses the development of the ERISA fiduciary duty to disclose, and in this regard explores the fiduciary duty to disclose at common law, the interpretation of ERISA's fiduciary duty to disclose in the federal courts of appeals and the evolution of ERISA's fiduciary duty to disclose in the Third Circuit. Next, Part III focuses on the Third Circuit's opinion in Fischer II, providing an in-depth analysis of the "serious consideration" formulation. Finally, Part IV considers some conclusions regarding the practical significance of the Fischer II holding.

10. See generally, Bintz, supra note 8, at 979-1004 (providing thorough historical analysis). For a discussion of the federal appellate courts' interpretations of ERISA's fiduciary duty to disclose regarding potential plan changes, see infra notes 40-74 and accompanying text.
11. 994 F.2d 130 (3d Cir. 1993).
12. Id. at 135. For a discussion of the Third Circuit's holding in Fischer I, see infra notes 95-98 and accompanying text.
14. Id. at 1538-43 (pronouncing and applying "serious consideration" formulation). For a discussion of the Third Circuit's holding in Fischer II, see infra notes 100-51 and accompanying text.
15. For a discussion of the Third Circuit's "serious consideration" formulation, see infra notes 108-31 and accompanying text.
16. For a discussion of ERISA's regulatory scheme, see infra notes 20-33 and accompanying text.
17. For a discussion of the fiduciary duty to disclose at common law, see infra notes 34-39 and accompanying text. For a discussion of the federal appellate courts' interpretations of the ERISA fiduciary duty to disclose, see infra notes 40-64 and accompanying text. For a discussion of the development of the ERISA fiduciary duty to disclose in the Third Circuit, see infra notes 65-74 and accompanying text.
18. For a discussion of the Third Circuit's opinion in Fischer II, see infra notes 75-131 and accompanying text.
19. For a discussion of the practical application of the Fischer II holding, see infra notes 132-43 and accompanying text.
II. OVERVIEW OF THE FIDUCIARY DUTY TO DISCLOSE POTENTIAL CHANGES TO AN EMPLOYEE BENEFIT PLAN UNDER ERISA

A. ERISA’s Regulatory Scheme: Two Components of Conduct Regulation

ERISA is the vehicle through which Congress federalized the law governing privately sponsored employee benefit plans. Congress enacted ERISA with the dual purpose of protecting employees’ rights to pension and welfare benefits, and encouraging the development of the private pension and welfare benefit system without placing excessive burdens on it. To promote uniformity, ERISA preempts state regulation of employee benefit plans.

ERISA’s regulatory regime governs only certain employee benefit plans. See id. (citing 29 U.S.C. § 1003(a) (1994)). ERISA defines an employee benefit plan as “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” Id. (quoting 29 U.S.C. § 1002(3) (1994)). Under ERISA, a pension plan is a program that “systematically defers cash compensation until termination of employment (or longer).” Id. (citing 29 U.S.C. § 1002(2)(A)). On the other hand, a welfare plan is a program that “provides any of certain specifically-listed benefits...whether the benefit plan is provided on a current or deferred basis.” Id. at 564-65. Moreover, “[a] benefit arrangement must constitute a ‘plan, fund, or program’ to qualify as either a pension plan or a welfare plan.” Id. at 565. For a discussion of how courts have struggled with the concept of a “plan,” see Wiedenbeck, supra, at 576-96.

Congress enacted ERISA after a decade of work on pension and employee benefit issues. See Jeffrey A. Brauch, The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty Under ERISA, 41 WAYNE L. REV. 1283, 1287 (1995) (expounding upon ERISA’s background and legislative history). In enacting ERISA, Congress responded to the phenomena that many employees who had been promised pensions were not receiving them. See id. (citing 29 U.S.C. § 1001(a)).
For example, the 1963 closing of the Studebaker automobile plant in South Bend, Indiana caused the termination of the company's pension plan, which covered 11,000 auto workers. See id. at 1238. One commentator noted that "the plan was so seriously underfunded at termination that 4,000 employees between the ages of forty and fifty-nine with at least ten years of service, and whose pensions had vested, received only fifteen cents on the dollar of their accrued benefits." Id. As such, several commentators view this incident as the "pivotal event in the history of the movement toward comprehensive federal regulation of private pension plans." Id. at 1238 (quoting JOHN H. LANBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 62 (2d ed. 1995)).

Congress blamed plan fiduciaries for the underfunding that resulted in the failure of pension plans. See id. One commentator observed that "[i]t determined that action was needed to prevent fiduciary self-dealing, misappropriation of plan funds, and imprudent investing." Id.; see also 120 CONG. REC. 29,954 (1974) (statement of Sen. Javits) (stating that "absence of any supervision over these funds and lack of minimum standards to safeguard the interests of plan participants and beneficiaries has led . . . to widespread complaints signaling the need for remedial legislation."); 120 CONG. REC. 29,949-50 (statement of Sen. Bentsen) (noting that new law will prevent abuses due to underfunding by setting minimum standards); 120 CONG. REC. 29,957 (1974) (statement of Sen. Ribicoff) (observing that employers often manipulate pension funds or make bad investments). In fact, ERISA's Findings and Declaration of Policy states that:

The Congress finds that . . . many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . . .

Brauch, supra, at 1237-38 (citing 29 U.S.C. § 1001(a)); see also 120 CONG. REC. 29,950 (statement of Sen. Bentsen) ("Government statistics indicate that during 1972 alone more than 15,000 pension plan participants lost retirement benefits because their pension plan terminated with insufficient assets to meet all plan obligations.").

Regarding Congress's goal of alleviating excessive burdens on the development of the private pension and welfare benefit system, one commentator observed that Congress had found that "plans and plan sponsors faced a maze of different and often conflicting state laws and regulations that resulted in administrative inefficiencies and costs that ultimately hurt plan participants." Brauch, supra, at 1238; see also 120 CONG. REC. 29,198 (statement of Rep. Ullman) (finding that "these new requirements have been carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans"); 120 CONG. REC. 29,210 (statement of Rep. Rostenkowski) (expressing that "[t]he goal of this legislation was to strengthen the rights of employees under existing pension systems, while at the same time encouraging the expansion of these plans and the creating of new ones"); 120 CONG. REC. 29,945 (statement of Sen. Long) (observing that "[w]e know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill"); 120 CONG. REC. 29,949 (statement of Sen. Bentsen) (noting that "it is important to recognize that if minimum standards are set too high, we would discourage the creation of new plans"); 120 CONG. REC. 29,953 (statement of Sen. Nelson) (stating that "[i]n all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining
ployee benefit plans and grants exclusive jurisdiction to the federal courts to enforce its requirements.22

ERISA embodies two components that regulate conduct in the administration of employee benefit plans.23 First, ERISA's specific reporting and disclosure rules mandate that certain information concerning plan terms and finances be filed with the Department of Labor, the Pension Benefit Guaranty Corporation and the Internal Revenue Service.24 In addition, whether a pension plan will be adopted”). As a result of these and other concerns, Congress enacted ERISA in 1974. See Brauch, supra, at 1239.

22. See Wiedenbeck, supra note 20, at 565, 569-71 (discussing various aspects of ERISA preemption). Section 1144(a) of ERISA broadly preempts “all State laws insofar as they may now or hereafter relate to any employee benefit plan [subject to ERISA].” 29 U.S.C. § 1144(a) (1994). In addition to having exclusive jurisdiction over the enforcement of ERISA’s requirements, the federal courts have concurrent jurisdiction with state courts over suits by a participant or beneficiary to enforce the terms of an ERISA-covered plan. See id. § 1132(e)(1).

23. For a discussion of the two components of ERISA conduct regulation in the administration of employee benefit plans, see infra notes 24-33 and accompanying text.

24. See 29 U.S.C. §§ 1021-1025 (1994). A principal disclosure document required by ERISA is the summary plan description. See Bintz, supra note 8, at 981. One commentator observed that: “A plan administrator is required to provide a summary plan description to each plan participant within ninety days of becoming a participant or, if later, within 120 days of the plan becoming subject to ERISA’s reporting and disclosure rules.” Id. (citing 29 U.S.C. § 1024(b)(1); 29 C.F.R. § 2520.104(b)(2) (1997)). In addition, summary plan descriptions must also be filed with the Department of Labor within 120 days of the date on which a plan becomes subject to ERISA’s reporting and disclosure rules. See id. at 981 n.6 (citing 29 U.S.C. § 1024(a)(1)(B); 29 C.F.R. §§ 2520.104a-2(a)). As such, ERISA requires that a summary plan description be “written in a manner ‘calculated to be understood by the average plan participant’ and must be ‘sufficiently comprehensive to apprise plan participants and beneficiaries of their rights and obligations under the plan.’” See id. at 981-82 (quoting 29 C.F.R. § 2520.102-2). Moreover, ERISA requires plan administrators to provide a summary description “of any material modifications to either the plan or other plan-related information that is required to be included in a summary plan description within 210 days after the end of the plan year in which the modification ... was adopted.” Id. at 982 (citing 29 U.S.C. §§ 1022(a)(1), 1024(b)(1)(B); 29 C.F.R. § 2520.104b-3). Finally, ERISA requires the plan administrator to provide a fully updated summary plan description to each plan participant every five years if the plan has been amended, or every 10 years if the plan has not been amended. See id. at 982 n.8 (citing 29 U.S.C. § 1024(b)(1)(B)).

Another disclosure document required by ERISA is the summary annual report, which summarizes the plan’s financial status. See id. at 982 (citing 29 U.S.C. § 1024(b)(3)). A plan administrator must provide each participant with a summary annual report within seven months of the close of each plan year. See id. (citing 29 U.S.C. § 1024(b)(3)). This report must contain “information regarding the amount of administrative expenses incurred by the plan, the amount of benefits paid to participants and beneficiaries, the value of plan assets, income or loss for the year, and the amount of net unrealized appreciation in plan assets during the plan year.” Id. (citing 29 C.F.R. § 2520.104(b)-10(d)). With respect to benefit pension plans, the summary annual report must contain a statement regarding the plan’s compliance with ERISA’s minimum funding standards. See id. at 982-83 (citing 29 C.F.R. § 2520.104(b)-10(d)). Furthermore, a participant is entitled to request a copy of the full annual report, which contains detailed information
the detailed reporting and disclosure rules mandate that certain information be disseminated to plan participants and beneficiaries, thus providing them with the information necessary to monitor plan administration and enforce their rights.25

Second, ERISA imposes fiduciary standards derived from trust law on persons with fiduciary status.26 ERISA broadly confers fiduciary status upon persons who have discretionary authority with respect to the management of plan assets or the administration of such a plan.27 Moreover, ERISA makes fiduciaries personally liable to the plan for breaches of their duties.28 Although ERISA does not specifically enumerate the duties of

regarding the plan's financial status and is filed each year with the Internal Revenue Service, the Department of Labor and the Pension Benefit Guaranty Corporation. See id. at 983 (citing 29 U.S.C. § 1024(b)(4)). Finally, ERISA requires various other disclosures to be made to participants with respect to several types of plans depending upon the circumstances. See id. at 983 n.15.

25. See Wiedenbeck, supra note 20, at 567-68 (explaining that disclosure of plan finances may deter fiduciary misconduct and "promote[ ] economic efficiency by providing participants and beneficiaries with the information they need to accommodate their personal financial affairs to the employer's program, as for example, in determining their need for additional savings or insurance"). For a description of the relevant disclosure documents required by ERISA's express reporting and disclosure rules, see supra note 24.

26. See 29 U.S.C. §§ 1101(a), 1104 (1994) (discussing imposition of fiduciary standards on individuals with fiduciary status). One commentator noted that ERISA's fiduciary obligations derive from the fact that those entitled to plan assets, namely plan participants and beneficiaries, do not possess any managerial authority and are limited in their ability to monitor plan administration. See Wiedenbeck, supra note 20, at 568. Because the essence of the trust relationship is the separation of enjoyment and control, the commentator explained, the trustee's obligations provided the model for the fiduciary's obligations under ERISA. See id. In fact, the commentator observed, ERISA generally requires plan assets to be held in trust. See id. (citing 29 U.S.C. § 1103(a) (1994)).

27. See 29 U.S.C. § 1002(21)(A) (1994) (discussing conferral of fiduciary status under ERISA). Section 1002(21)(A) states that a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Id. It is apparent from this language that ERISA fiduciary status is not limited to those called "trustee" or "fiduciary." See Brauch, supra note 21, at 1239. Instead, fiduciary status is based upon function rather than title. See id. Hence, an individual is a "fiduciary to the extent that he exercises discretionary authority of control over the administration of a plan or its assets." Id. (citing 29 U.S.C. § 1002(21)(A) (1994)).

28. See 29 U.S.C. § 1109(a) (1994) (discussing liability of fiduciaries under ERISA). Section 1109(a) provides that any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such
the fiduciary, the statutory language sets forth the general scope of fiduciary obligations attaching to employee benefit plans.29 A fiduciary is obligated to discharge his or her duties "solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of . . . provide-

plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Id.

In addition to the liability provision, Congress provided a set of exclusive federal remedies for violations of ERISA. See Brauch, supra note 21, at 1241 (noting that Congress did not adopt every state remedy that existed prior to enactment of ERISA). Accordingly, § 1131 provides criminal penalties for anyone who willfully violates any of ERISA's reporting and disclosure requirements. See id. (citing 29 U.S.C. § 1131 (1994)). Alternatively, § 1132(a) identifies six types of civil actions regarding ERISA violations. See id. (citing 29 U.S.C. § 1132(a) (1994)). In particular, "[t]hree subsections of 1132(a) are relevant to individual claims for breach of fiduciary duty." Id. at 1241-42. The first, § 1132(a)(1)(B), provides participants and beneficiaries with the right to recover benefits due under the terms of a plan. See id. at 1242 (citing 29 U.S.C. § 1132(a)(1)(B)). The second, § 1132(a)(2), incorporates § 1109 and provides a direct mechanism to impose personal liability on fiduciaries for breach of fiduciary duty. See id. (citing 29 U.S.C. § 1132(a)(2)). Finally, the third, § 1132(a)(3), uses broader language permitting recovery in certain circumstances:

A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation, or (ii) to enforce any provisions of this title or the terms of the plan.

Id. (quoting 29 U.S.C. § 1132(a)(3)).

It is noteworthy that, of these remedy provisions, only § 1132(a)(2) addresses breaches of a fiduciary duty; however, because this section incorporates §§ 1109, § 1132(a)(2) only permits plan-wide relief. See id. Therefore, many courts have settled upon the broad language of § 1132(a)(3) as the statutory basis for individual claims for breach of fiduciary duty. See id. Recently, the Supreme Court affirmed this interpretation when it held that the beneficiaries of an employee benefit plan can bring suit in their individual capacities under § 1132(a)(3), rather than only on behalf of the employee benefit plan. See Varity Corp. v. Howe, 516 U.S. 489, 507-15 (1996). In light of the Varity holding, one commentator observed that § 1132(a)(3) provides courts with a vehicle through which to award equitable and other appropriate relief to individuals for ERISA violations. See William L. Scogland, ERISA Case Law Update, in 25TH ANNUAL INSTITUTE ON EMPLOYMENT, at 613, 616 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5237, 1996) (observing that, under Varity, beneficiaries can bring suit and obtain relief).

29. See 29 U.S.C. § 1104(a) (defining scope of fiduciary's obligations under ERISA). Section 1104(a) provides, in relevant part:

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; . . .

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

Id. § 1104(a)(1)(A)-(B).
ing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan."30 Likewise, pursuant to ERISA's "prudent man rule," a fiduciary is obligated to discharge his or her duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."31 In essence, these statutory duties merely restate common law trustee obligations.32 Nevertheless, based upon ERISA's legislative history and the grant of enforcement jurisdiction to the federal courts, the United States Supreme Court has pronounced the expectation that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans."33

B. Fiduciary Obligations Under ERISA—Toward a Duty to Disclose That Supplements ERISA's Express Reporting and Disclosure Rules

1. Fiduciary Disclosure Obligations at Common Law

As previously stated, ERISA does not set forth the express duties of a fiduciary.34 Therefore, the extent to which ERISA includes a duty to dis-
close information to plan participants and beneficiaries that supplements its express reporting and disclosure requirements is uncertain. Because the general purview of ERISA’s fiduciary obligations is determined with regard to common law trust principles, understanding the scope of a fiduciary’s duty to disclose at common law is crucial to understanding the scope of such a duty under ERISA. The Restatement (Second) of Trusts, which describes the fiduciary’s duty to disclose at common law, provides that a trustee has a “duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest.” Prior to the enactment of ERISA, courts applied this general disclosure obligation to fiduciaries of employee benefit plans.

35. See Bintz, supra note 8, at 988. One commentator observed that “[t]he express language of ERISA provides little indication as to whether there is ever a fiduciary duty to disclose information to participants and beneficiaries. Neither ERISA’s fiduciary duty nor reporting and disclosure rules directly address the relationship between the two sets of rules.” Id.


37. Restatement (Second) of Trusts § 173 cmt. d (1959); see Perritt, supra note 20, § 4.13 (“Generally, the common law of trusts, incorporated by ERISA, imposes on trustees duties of loyalty to the beneficiaries and duties of care in administering the trust.”).

38. See Bintz, supra note 8, at 985 (discussing application of general disclosure obligation prior to enactment of ERISA). Prior to the enactment of ERISA, pension and welfare benefit plans were subject to the Welfare and Pension Plans Disclosure Act (“Act”). See id. at 985 n.21 (citing Welfare and Pension Plan Disclosure Act, Pub. L. No. 85-856, 72 Stat. 997 (1958), repealed by Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829). The Act required private pension plans covering more than 25 employees to file a plan description with the Department of Labor, maintain a copy of the plan description at the principal office of the plan and provide a copy of the plan description to participants and beneficiaries upon request. See id. The Act required the plan description to describe the procedures a participant had to follow to file a claim for benefits or obtain review of a denied claim. See id. In addition, the Act required that the plan description be accompanied by a copy of the plan or the instrument by which the plan was created or funded. See id. Nevertheless, the Act did not require that the plan description explain the vesting rules or events that could result in the forfeiture of benefits. See id. Finally, the Act required private pension plans covering
Although the Act failed to encompass express fiduciary standards, state courts applied general trustee disclosure obligations to fiduciaries of employee benefit plans. See id. at 985. One commentator specifically focused on several key pre-ERISA state court decisions to illustrate this point. See id. at 985-87. In the first of these decisions, the New Jersey Superior Court held that the trustees of a pension fund had a fiduciary duty to disclose the plan’s eligibility requirements to all potential participants. See Branch v. White, 239 A.2d 665, 671 (N.J. Super. Ct. App. Div. 1968). In Branch, the plan, which had been established through a collective bargaining agreement between a union and an association of contractors, required participating employees to contribute two dollars each month to fund the plan. See id. at 667. The plaintiffs, who were not members of the union, claimed that they had not been informed of the plan or its eligibility requirements, and that only members of the union had been informed. See id. at 668. The court reversed and remanded a lower court decision in favor of the defendant trustees, holding that the trustees had a fiduciary duty to make full disclosure to the nonmembers of the union regarding the conditions for participation in the plan. See id. at 671; see also Shallcross Express, Inc. v. Trucking & Allied Indus. Pension Fund, 290 A.2d 744, 751 (N.J. Super. Ct. Law Div. 1972) (requiring trustees to fully disclose all facts within their knowledge that are material to protection of beneficiaries’ interests).

Similarly, the California Court of Appeals held that the trustees of a pension fund had a fiduciary duty to disclose the manner in which they were interpreting a short-term contribution provision when such interpretation resulted in adverse consequences to the beneficiaries of the pension fund. See Lix v. Edwards, 147 Cal. Rptr. 294, 299-300 (Ct. App. 1978). In Lix, the plaintiffs worked for an employer who contributed to their pension fund for 38 months until it sold its assets. See id. at 296. After purchasing the assets, the second employer contributed to the pension fund for 17 months before permanently closing the facility and ceasing pension fund payments. See id. at 297. The pension fund included a short-term contribution provision under which the trustees of the pension fund could terminate employee pension benefits if the employer’s obligation to contribute to the pension fund ended before 48 months. See id. at 296. Pursuant to this short-term contribution provision, the trustees declared that the second employer was a new and separate contributing employer that failed to contribute for 48 months and, therefore, terminated the plaintiffs’ pension benefits. See id. at 297. Nevertheless, the court reversed and remanded a lower court decision in favor of the trustees, concluding that prior to the trustees’ acceptance of the second employer as a new contributing employer, the trustees had a fiduciary duty to provide written notice to the plaintiffs of any adverse consequences regarding the transfer of assets to the second employer if such transfer would create a break in employer contributions under the pension plan. See id. at 299-300. Accordingly, the court held that the trustees were estopped from terminating the plaintiffs’ benefits because the trustees failed to provide such notice. See id.

Finally, a third case signaled more recent decisions addressing the issue of whether a fiduciary has a duty to provide individualized disclosure to plan participants and beneficiaries under ERISA. See Erion v. Timken Co., 368 N.E.2d 312, 313 (Ohio Ct. App. 1976). In Erion, the surviving spouse of a deceased retiree claimed that her husband’s former employer negligently failed to advise her husband that if he delayed his retirement for seven days his spouse would be entitled to a survivor death benefit. See id. at 313-14. The plaintiff’s husband had discussed his retirement with a representative of the employer’s insurance department; however, the representative did not inform the plaintiff’s husband that a seven-day delay in his retirement would entitle his wife to a survivor’s benefit. See id. at 317. As a result, the Ohio Court of Appeals concluded that a fiduciary relationship existed between the employer and its employees regarding the discussions it had
ERISA common law, which provides the foundation for ERISA's fiduciary standards, acknowledged a fiduciary duty to disclose information to participants and beneficiaries in certain circumstances, there is "no well-grounded basis on which wholly to exclude a duty to disclose from ERISA's fiduciary requirements."

2. Interpretation of ERISA's Fiduciary Duty to Disclose Regarding Potential Plan Changes in the Federal Courts of Appeals

Precedent has established that the employer "wears two hats" in administering employee benefit plans. Courts have observed the inherent conflict in an "employer's prerogative to initiate discretionary policy decisions such as creating, amending, or terminating a particular plan ... for the benefit and interests of its participant-employees." Hence, a particularly difficult issue that employers face is whether there is ever a fiduciary duty to disclose plan changes that are under consideration, but not yet adopted or implemented.

Until recently, the Supreme Court of the United States had never defined the scope of an employer's fiduciary duty to disclose under ERISA. However, the Supreme Court established that the
scope of such duty is quite broad. In Varity, the Court held that an employer violated its ERISA fiduciary obligations by materially misleading its employees in matters related to an employee benefits plan. Because Varity involved an employer that made material misrepresentations to plan participants, the Supreme Court did not have to "reach the question of whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries." Hence, in the wake of Varity, an unsettled temporal issue regarding potential plan changes remains for the United States courts of appeals—whether this fiduciary duty to disclose begins at the time of, or prior to, the adoption of a plan amendment.

Although the federal courts of appeals agree that plan administrators have a fiduciary duty not to affirmatively misrepresent material facts to plan participants, the law remains unsettled regarding the scope of a fiduciary's duty to disclose beyond the specific reporting and disclosure requirements of ERISA. Specifically, the federal courts of appeals vary in their response to the issue of whether a fiduciary has a duty to disclose plan changes that are under consideration, but not yet adopted. Some

44. Id. at 496-507 (discussing scope of fiduciary duty to disclose under ERISA).
45. Id. at 506-07. Varity involved an employer who made misrepresentations regarding the security of its employees' benefits to induce several employees to transfer to a separate division the employer had created for its failing businesses. See id. at 492-94. Subsequently, the division ended its second year in a receivership and the employees lost their nonpension benefits. See id. at 495. Accordingly, the Court found that the employer participated "knowingly and significantly in deceiving [plan beneficiaries] in order to save the employer money at the beneficiaries' [ ] expense." Id. at 500. As such, the Court determined that this was not an act solely in the beneficiaries' interest and, therefore, held that the employer breached its fiduciary duty to disclose truthful information. See id. at 506-07.
46. Id. at 506.
47. See, e.g., Taylor v. Peoples Natural Gas Co., 49 F.3d 982, 990 (3d Cir. 1995) (stating that plan administrators would breach fiduciary duty by making misrepresentations regarding possible changes to plan); Maez v. Mountain States Tel. & Tel., Inc., 54 F.3d 1488, 1499-1501 (10th Cir. 1995) (same); Wilson v. Southwestern Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995) (same); Swinney v. General Motors Corp., 46 F.3d 512, 520-21 (6th Cir. 1995) (same); Vartanian v. Monsanto Co., 14 F.3d 697, 702 (1st Cir. 1994) (same); Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750 (D.C. Cir. 1990) (same); Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163-64 (6th Cir. 1988) (same).
48. Compare Sutter v. BASF Corp., 964 F.2d 556, 562 (6th Cir. 1992) (finding that company is not acting as fiduciary agent when deciding to amend or terminate welfare benefits plan), Barnes v. Lacy, 927 F.2d 541, 544 (11th Cir. 1991) (holding that employer did not breach duty by failing to notify employees of provision under which employer retained right to amend retirement plan), Payonk v. HMW Indus., Inc., 883 F.2d 221, 229 (3d Cir. 1989) (holding that "an employer's lawful termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA's standards of fiduciary duties"), and Porto v. Armco, 825 F.2d 1274, 1276 (8th Cir. 1987) (refusing to recognize fiduciary duty to disclose that supplements ERISA's specific reporting and disclosure rules), with Fischer I, 994 F.2d 130, 135 (3d Cir. 1993) (finding that employer may breach fiduciary duty under ERISA by failing to disclose information regard-
courts have approached this issue by refusing to recognize a fiduciary duty to disclose potential plan changes that supplements ERISA's express reporting and disclosure rules. For instance, in Porto v. Armco, Inc., the United States Court of Appeals for the Eighth Circuit held that plan administrators do not have to provide disclosure earlier than required by ERISA's statutory disclosure standards to meet their fiduciary duty. Instead, the court reasoned that a fiduciary duty is discharged once the plan administrators meet ERISA's express disclosure requirements. Although Porto broadly rejects the existence of a fiduciary duty to disclose that supplements ERISA's reporting and disclosure requirements, plan administrators should not exclusively rely on this decision because the Eighth Circuit's holding is contrary to other circuit decisions that have expanded a fiduciary's disclosure duties beyond ERISA's express terms under certain conditions.

49. See Porto, 825 F.2d at 1276 (refusing to recognize fiduciary duty to disclose that supplements ERISA's specific reporting and disclosure rules); see also Sutter, 964 F.2d at 562 (finding that company is not acting as fiduciary agent when deciding to amend or terminate welfare benefits plan); Barnes, 927 F.2d at 544 (holding that employer did not breach duty by failing to notify employees of provision under which employer retained right to amend retirement plan); Stanton v. Gulf Oil Corp., 792 F.2d 432, 435 (4th Cir. 1986) ("It is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect.").

50. 825 F.2d 1274 (8th Cir. 1987).

51. Id. at 1276. In Porto, the plaintiff made an irrevocable decision to defer certain distributions from the company pension plan upon retirement. See id. at 1274-75. Subsequently, the company adopted a plan allowing "once irrevocable decision[s] on withdrawal choices upon retirement to be revocable." Id. at 1275. As such, the plan administrator notified all of the local employed plan participants of the amendment, but did not notify the local retired plan participants, such as the plaintiff. See id.

52. See id. at 1276 (affirming district court conclusion that "as a matter of law, a breach of fiduciary duty claim cannot be based on failure to disclose when the statutory disclosure requirements have been met").

53. See Bintz, supra note 8, at 993 (discussing United States Court of Appeals for the Eighth Circuit's holding in relation to decisions of other federal courts of appeals).
Indeed, other courts have expanded a fiduciary’s disclosure duties to encompass a duty to disclose plan changes that are under consideration, but not yet implemented.\textsuperscript{54} For instance, in \textit{Drennan v. General Motors Corp.},\textsuperscript{55} the United States Court of Appeals for the Sixth Circuit held that plan administrators have an affirmative duty to disclose information regarding future plan amendments under serious consideration to affected employees.\textsuperscript{56} One commentator interpreted the \textit{Drennan} opinion as requiring a fiduciary to disclose the fact that plan changes are under serious consideration, but not the details of the decision-making process.\textsuperscript{57} Similar

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\textsuperscript{54} See, e.g., Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991-92 (7th Cir. 1993) (holding that fiduciary duty to disclose material facts affecting interests of beneficiaries exists regardless of whether he or she asks for information); Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992) (holding that plan administrators have duty to disclose plan changes that are under serious consideration); Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 749 (D.C. Cir. 1990) (ruling that plan administrators have duty to disclose complete and correct material information about plan options to plan participants).

\textsuperscript{55} 977 F.2d 246 (6th Cir. 1992).

\textsuperscript{56} Id. at 251. In \textit{Drennan}, a class of laid-off employees who had waived certain employment rights in exchange for lump-sum payments under a supplemental unemployment plan claimed that the defendant employer breached its fiduciary duties by failing to disclose that it was seriously considering making a more generous plan available to them. \textit{See id.} at 249. Before the plaintiffs accepted the supplemental unemployment plan, they had questioned management about the possibility of coverage under the more generous plan. \textit{See id.} In response, management informed them that the plan would not be made available to them despite the fact that it was seriously considering making the plan available to them. \textit{See id.} Therefore, the United States Court of Appeals for the Sixth Circuit found that the employer had a fiduciary duty to keep the plaintiffs informed of its consideration to permit their participation in the more generous plan so as to enable them to arrive at a meaningful decision. \textit{See id.} at 251. Likewise, the court broadly stated that a fiduciary “‘has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship.’” \textit{Id.} (quoting \textit{Eddy}, 919 F.2d at 750).

Prior to \textit{Drennan}, the Sixth Circuit addressed similar claims in another case, but decided the claims on a narrower rationale. \textit{See} Berlin v. Michigan Bell Tel., 858 F.2d 1154, 1163-64 (6th Cir. 1988). In \textit{Berlin}, the court held that once the plan fiduciary gave “serious consideration” to the plan change, it had a duty not to make misrepresentations concerning the plan change. \textit{See id.} In contrast to the broad language of \textit{Drennan}, the Sixth Circuit noted in \textit{Berlin} that it was not holding that a plan fiduciary had any duty “to say anything at all or to communicate with potential plan participants about [future plan changes].” \textit{Id.} at 1164. Subsequent to \textit{Drennan}, it seems the Sixth Circuit may have returned to this narrower rationale. \textit{See} Muse v. International Business Machs. Corp., 103 F.3d 490, 494 (6th Cir. 1996) (recognizing serious consideration as narrow exception to general rule that fiduciaries are not required to disclose changes in plan before adoption), \textit{cert. denied}, 117 S. Ct, 1844 (1997).

\textsuperscript{57} \textit{See} Bintz, supra note 8, at 995. Addressing some contradictory language in the \textit{Drennan} opinion, one commentator explained that [t]hough the Court of Appeals for the Sixth Circuit stated that “the duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected
larly, in *Eddy v. Colonial Life Insurance Co. of America*, the United States Court of Appeals for the District of Columbia held that a fiduciary's duty is not discharged by mere compliance with ERISA's express reporting and disclosure rules. Rather, the court imposed an obligation on the plan administrator not only to avoid misleading participants, but also to fulfill the affirmative duty to disclose complete and correct material information about plan options to plan participants. The *Eddy* court's broad language is regarded as the most expansive interpretation of the fiduciary duty to disclose under ERISA.

In contrast to the latter approach, the United States Court of Appeals for the Second Circuit has restricted a fiduciary's disclosure duties concerning plan changes that are under consideration, but not yet imple-

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employees," it also stated that the duty to provide complete and accurate information in response to participants' questions, "does not require the fiduciary to disclose its internal deliberations." Based on these somewhat contradictory statements, it appears that when changes to a plan are under consideration, the Court of Appeals for the Sixth Circuit would require a fiduciary to disclose that fact, but not the details of the decision-making process.

*Id.* (quoting *Drennan*, 977 F.2d at 251).

58. 919 F.2d 747 (D.C. Cir. 1990).

59. *Id.* at 750. In *Eddy*, the plaintiff asked the plan fiduciary about converting rights under an employer-sponsored group health policy to an individual policy and was mistakenly told that he did not have such rights. *See id.* at 749. Relying on this information, the plaintiff failed to convert and, as a result, his health coverage terminated. *See id.* Thus, the United States Court of Appeals for the District of Columbia Circuit upheld the plaintiff's claim that the plan fiduciary breached its duties under ERISA by misinforming the plaintiff regarding the conversion rights. *See id.*

60. *See id.; see also* Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991-92 (7th Cir. 1993) ("Fiduciaries must also communicate material facts affecting the interests of beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not." (citations omitted)).

61. *See, e.g.,* Bintz, *supra* note 8, at 998 ("The Court of Appeals for the D.C. Circuit's decision in *Eddy v. Colonial Life Insurance Co.*, however, has created substantial uncertainty and concern among plan sponsors and fiduciaries by indicating that ERISA's fiduciary duty rules may encompass a broad duty to provide individualized disclosure.").
For example, in Pocchia v. NYNEX Corp., the court ruled that a fiduciary of an employee benefit plan has no affirmative duty to disclose information regarding a proposed plan change prior to its adoption to employees who failed to request such information.

Consistent with other circuits, the United States Court of Appeals for the Second Circuit held that a plan fiduciary may not make affirmative material misrepresentations about proposed future changes to an employee benefit plan in Mullins v. Pfizer, Inc., 23 F.3d 663, 669 (2d Cir. 1994). Subsequently, in a recent case, the Second Circuit considered the contours of its Mullins decision, holding that the "serious consideration" of a potential plan change is not a prerequisite to the materiality inquiry when a plan fiduciary makes affirmative misrepresentations to plan beneficiaries that lead them to believe that future plan changes will not be implemented. See Ballone v. Eastman Kodak Co., 109 F.3d 117, 122 (2d Cir. 1997). Instead, the Second Circuit concluded that once it is established that the plan fiduciary made affirmative misrepresentations, "[w]hether a plan is under serious consideration is but one factor in the materiality inquiry." Id. at 123. Indeed, the court found that the materiality inquiry "turns primarily on the nature and context of the [plan fiduciary's] assurance." Id. at 124. In contrast to its decision in Ballone, which involved a plan fiduciary who responded to employee inquiries, the Pocchia court held that a plan fiduciary need not volunteer information to plan beneficiaries regarding proposed plan changes that have not been adopted in the absence of specific inquiry. Pocchia, 81 F.3d at 278. In this regard, the Second Circuit's approach is similar to the approach adopted by the United States Court of Appeals for the Fourth Circuit, which has held that "[i]t is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect." Stanton v. Gulf Oil Corp., 792 F.2d 432, 435 (4th Cir. 1986).

Pocchia involved a plaintiff who voluntarily resigned from his position with the defendant. Id. at 277. Several months later, the defendant announced a new early retirement incentive program that would have provided the plaintiff with greater benefits. See id. Although the plaintiff had already resigned, he requested that the defendant include him in the new program. See id. Upon the defendant's refusal to do so, the plaintiff filed suit in federal district court, claiming that the defendant had breached its fiduciary duty under ERISA by failing to inform him at the time of his retirement that it had decided to implement the program or, alternatively, that it was considering implementing the program. See id. After the district court granted the defendant's motion for summary judgment, finding that ERISA imposed no such duty on the defendant, the plaintiff appealed. See id.

On appeal, the Second Circuit emphasized that although ERISA sets forth the duty of plan fiduciaries to act solely in the interest of a plan's participants and beneficiaries, it is the courts that have defined the scope of that duty as applied to particular situations. See id. at 278. The court noted that it is well settled that plan fiduciaries may not affirmatively mislead plan participants about changes to an employee benefit plan, regardless of whether those changes have been adopted or are merely proposed. See id. In contrast, the Second Circuit acknowledged that courts have not reached a consensus regarding whether, in the absence of an inquiry from a participant or beneficiary, fiduciaries have an affirmative duty to disclose plan changes that have been proposed or are under consideration, but not adopted. See id. The court observed that such an affirmative duty has been imposed only in cases in which the fiduciary's failure to voluntarily disclose contem-

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62. See Pocchia v. NYNEX Corp., 81 F.3d 275, 278 (2d Cir.) (holding that plan fiduciaries are not required to volunteer information regarding potential plan changes and, thus, limiting plan fiduciaries' disclosure duties to situations in which they voluntarily disseminate such information), cert. denied, 117 S. Ct. 302 (1996).


64. Id. at 278. Pocchia involved a plaintiff who voluntarily resigned from his position with the defendant. Id. at 277. Several months later, the defendant announced a new early retirement incentive program that would have provided the plaintiff with greater benefits. See id. Although the plaintiff had already resigned, he requested that the defendant include him in the new program. See id. Upon the defendant's refusal to do so, the plaintiff filed suit in federal district court, claiming that the defendant had breached its fiduciary duty under ERISA by failing to inform him at the time of his retirement that it had decided to implement the program or, alternatively, that it was considering implementing the program. See id. After the district court granted the defendant's motion for summary judgment, finding that ERISA imposed no such duty on the defendant, the plaintiff appealed. See id.
In summary, the foregoing circuit decisions illustrate that no intelligible standard has emerged for determining whether the imposition of a fiduciary duty to disclose that supplements ERISA’s express reporting and disclosures rules is appropriate in certain circumstances or, more specifically, whether there is ever a fiduciary duty to disclose plan changes that are under consideration, but not yet adopted. Because this Casebrief is concerned with the law regarding this issue in the Third Circuit and considering that the Supreme Court has not ruled on this issue, examining the other circuits’ decisions simply provides the context in which to view the Third Circuit approach.

3. The Evolution of ERISA’s Fiduciary Duty to Disclose in the Third Circuit

The Third Circuit has embraced a broad interpretation of the ERISA fiduciary duty to disclose. In the Third Circuit, a pension plan participant may base a claim of breach of fiduciary duty under ERISA on alleged changes would perpetuate the participants’ confusion. See id. The court instead characterized the plaintiff’s case as the more common situation in which a participant simply believed that he should have been given more information to make an informed decision. See id.

In this regard, the court held that ERISA does not require plan fiduciaries to voluntarily disclose changes in a benefit plan before such changes are adopted. See id. The court reasoned that requiring voluntary disclosure during the formulation of a plan or plan change would both increase the likelihood of participant confusion and impose an undue burden on management, which would be faced with continuing uncertainty about whether and when to make such disclosures. See id. Moreover, the court found that it could interfere with legitimate business goals, such as work force reduction, when early retirement incentives are often used as a last resort if retirements or resignations do not accomplish the reductions desired. See id. The court noted that employees would be unlikely to retire or resign if they knew that a possible incentive was being contemplated. See id.

Finally, the court emphasized that permitting plan fiduciaries to keep their pre-adoption deliberations a secret would not frustrate ERISA’s purpose of ensuring that participants have sufficient information to enable them to confirm that the plan is financially sound and properly administered. See id. at 279. In the court’s opinion, its bright-line rule would protect the interests of both participants and beneficiaries, who will receive information at the earliest point at which it actually may affect their rights, and fiduciaries, who will be required to provide information only at the point at which it is complete and accurate. See id. Having reached these conclusions about the law, the court found that the plaintiff had failed to present evidence that would support his alternative contention that the defendant had already adopted the program at the time of his resignation. See id. at 279-80.

65. Cf. In re Unisys Corp., 57 F.3d 1255, 1264 (3d Cir. 1995) (finding that “satisfaction by [a] . . . plan administrator of its . . . disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may . . . breach its fiduciary duty . . . to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed”); Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (“This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.”); Fischer I, 994 F.2d 130, 135 (3d Cir. 1993) (“A plan administrator may not make affirmative material misrepresenta-
tions that a plan administrator affirmatively and materially misrepresented the terms of a plan. 66 Case law provides that an ERISA fiduciary has a duty under § 1104(a) to convey complete and accurate information regarding plan benefits when it communicates with plan participants. 67

For example, in Bixler v. Central Pennsylvania Teamster Health & Welfare Fund, 68 the court adopted the District of Columbia Circuit’s broad construction of the duty to disclose. 69 The court held that a fiduciary has a duty to disclose complete and accurate information that is material to the plan participant’s or beneficiary’s circumstances even if their circumstances are broader than their inquiry. 70 The Third Circuit’s expansive construction of the duty to disclose under ERISA, however, is perhaps best illustrated by its ruling in Taylor v. Peoples Natural Gas Co. 71 In Taylor, the court held that a plan administrator may even be held liable for the material misrepresentations made by individuals selected by the plan administrator as nonfiduciary agents to assist in its fiduciary obligation to administer the plan. 72

66. See Bixler, 12 F.3d at 1298 (allowing plan participants to seek individual relief for breach of fiduciary duty under ERISA). In Bixler, the Third Circuit adopted the rationale of Justice Brennan from his concurring opinion in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985). Bixler, 12 F.3d at 1298. In Massachusetts Mutual, Justice Brennan, who was joined by three other justices, found that “[s]ection 502(a)(3) authorizes the award of ‘appropriate equitable relief’ directly to a participant or beneficiary to ‘redress’ ‘any act or practice which violates any provision of this title.’” Massachusetts Mutual, 473 U.S. at 153 (Brennan, J., concurring) (quoting 29 U.S.C. § 502(a)(3) (1994)). Accordingly, the Third Circuit held that the scope of the § 502(a)(3) “appropriate equitable relief” clause extended to individual recovery for “breach of the statutorily created fiduciary duty of a plan administrator.” See Bixler, 12 F.3d at 1298. Subsequently, the Supreme Court affirmed this approach in Varity. Varity Corp. v. Howe, 516 U.S. 489, 507-15 (1996).

67. See, e.g., Unisys Corp., 57 F.3d at 1265 n.15 (noting that ERISA fiduciary has duty to communicate “complete and accurate” information regarding beneficiary’s status); Bixler, 12 F.3d at 1300 (concluding that ERISA fiduciary has duty to convey complete and accurate information that is material to beneficiary’s circumstance); Fischer I, 994 F.2d at 135 (stating that ERISA fiduciary has obligation to answer plan participants’ questions in forthright manner).

68. 12 F.3d 1292 (3d Cir. 1993).

69. Id. at 1300 (adopting District of Columbia Circuit’s expansive interpretation of duty to disclose under ERISA, as established in Eddy).

70. See id.

71. 49 F.3d 982 (3d Cir. 1995).

72. Id. at 988-89. In Taylor, the court addressed a breach of fiduciary duty claim under ERISA based on statements made by a company supervisor who was not a member of the fiduciary committee administering the benefit plan. Id. The court concluded that the ERISA fiduciary plan administrator would be responsible for the nonfiduciary’s actions in the event that a misrepresentation was made because the supervisor had apparent authority to act as an agent of the administrator and could bind the plan and its fiduciaries. See id. On the facts of Taylor, however, the court found that no such misrepresentation had been made. Id. at 989-90.
Indeed, it seems that the imposition of an ERISA duty to disclose in the Third Circuit turns on the materiality of the information or misinformation. As such, the evolution of the fiduciary duty to disclose under ERISA has peaked with the court’s formulation of its materiality inquiry in Fischer II.

III. DISCUSSION

A. The Facts and Procedural History Regarding the Fischer II Breach of Fiduciary Duty to Disclose Claim: When the Employees Ask

1. Facts

In Fischer II, the defendant employer, Philadelphia Electric Company (“Company”), administered its employees' retirement and pension benefits plan, thus triggering fiduciary obligations under ERISA. In December 1989, the president of the Company announced to employees that the Company might consider an early retirement program if the Public Utility Commission (“PUC”) denied the Company’s request for a rate increase. Following an administrative law judge’s interim decision on March 1, 1990 that recommended the Company receive only a fraction of its requested rate increase, the Company quickly began to develop a set of early retirement alternatives. On March 20, the Company solicited a report on pos-

73. See, e.g., In re Unisys Corp., 57 F.3d 1255, 1264 (3d Cir. 1995) (noting that ERISA fiduciary has duty not to misinform employees through material misrepresentations); Bixler, 12 F.3d at 1300 (stating that duty to disclose material information is main responsibility of fiduciary); Fischer I, 994 F.2d 130, 135 (3d Cir. 1993) (holding that ERISA fiduciary may not make affirmative material misrepresentations to plan participants).


75. Fischer II, 96 F.3d at 1536.

76. See id. at 1537. Philadelphia Electric Company (“Company”) had considered early retirement programs during the previous year as part of a “long practice” of reviewing its retirement and pension benefits in the ordinary course of business; however, for various reasons, the Company had chosen not to implement the program. See id. at 1536-37. In July 1989, the Company requested a rate increase from the Public Utility Commission (“PUC”). See id. The PUC’s preliminary recommendation granted the Company less than half of its requested rate increase. See id. As a result, the Company hired a consulting firm to explore long-term strategies and cost-cutting measures. See id. The president of the Company used the consulting firm’s report to calculate the savings that an early retirement program could produce. See id.

On December 13, 1989, the president held three meetings with employees to discuss the importance of the rate increase to the Company. See id. In response to questions posed by employees, he stated that an early retirement plan might be considered if the rate request was denied. See id. Nevertheless, he explained that the Company had no plans for such a program because the outcome of the rate increase was uncertain. See id.

77. See id. at 1537.
sible programs from a benefits consulting firm. On April 7, at a corporate strategy meeting attended by the Company’s senior executives, the president stated that he planned to announce a $100 million cost-cutting program on April 20. On April 19, the PUC granted the Company a rate increase of only fifty percent of the Company’s request, and the president announced the early retirement program the same day.

During the time of the foregoing events, some of the Company’s employees were considering retirement. Pursuant to company policy, prospective retirees would notify the Company several months before they planned to retire and schedule an informational retirement interview with a Company benefits counselor. Six months prior to the president’s announcement, rumors about the early retirement plan began to circulate and some prospective retirees asked the benefits counselors about the possibility that such a plan would be adopted. Prior to the president’s announcement, the counselors responded that either no plan was being considered or that they had no knowledge of any plan.

2. Procedural History

The plaintiffs in Fischer II were employees who retired on January 1, February 1, March 1 and April 1, 1990, and who, therefore, were ineligible to obtain the benefits provided by the early retirement plan, but otherwise would have been eligible. The plaintiffs alleged, among other things, that the Company breached its fiduciary duties under §1104 of ERISA mainly through the misrepresentations made by its benefits counselors when the plaintiffs asked if the Company was considering an early retirement plan. 

78. See id.
79. See id.
80. See Fischer I, 994 F.2d 130, 132 (3d Cir. 1993). On May 25, the Board of Directors formally approved the early retirement program, which provided certain options that benefitted employees who elected to retire between July 15 and September 15, 1990. See id.
81. See id.
82. See id. ("The purpose of the interview was to provide the employee with information about retirement, including pension amount and options for life insurance.").
83. See id.
84. See id. The court observed that
[a]s far as the benefits counselors knew, they were telling the truth since the Company had not kept them abreast of any discussions taking place among senior management. Moreover, [their supervisor] had instructed them that if interviewees asked any questions, they were to be told "exactly what the plan called for at that time."
85. Id.
86. See id. at 132-35. In addition, the plaintiffs alleged that the Company was estopped from denying the class members increased pension benefits and that the Company engaged in discriminatory conduct in violation of § 510 of ERISA. See Fischer II, 96 F.3d 1533, 1543-44 (3d Cir. 1996) (discussing plaintiff’s allegations
In 1992, the United States District Court for the Eastern District of Pennsylvania granted the Company's motion for summary judgment, holding that the Company was under no duty to disclose the potential plan changes to the plaintiffs prior to the April 19, 1990 announcement as long as it made no material misrepresentations regarding its intention to alter the plan. Likewise, the court found that the benefits counselors' statements were not material misrepresentations because the potential changes to the plan had not been finalized. On appeal, however, in Fischer I, the Third Circuit reversed, holding that misrepresentations become material at the point in which the employer "seriously considers" the plan changes. Accordingly, the Third Circuit remanded the case so that the district court could determine the date when consideration became serious. On remand, the district court chose March 12, the date of initial contact between the Company and the benefits consulting firm, as the date when serious consideration began. In Fischer II, the Third Circuit reversed this finding and held that April 7, the date when senior management met to discuss the benefits consulting firm's proposals, was the date when serious consideration began. Therefore, the Third Circuit held that any employee who asked about a potential plan change after April 7, 1990, but before the formal announcement on April 19, 1990, received material misinformation and would have established a claim for breach of fiduciary duty under ERISA. Nevertheless, all the plaintiffs had retired before April 7 and, therefore, the court entered judgment for the Company on the plaintiffs' breach of fiduciary duty claim.
B. *The Third Circuit's Analysis of the Claim for Breach of the ERISA Fiduciary Duty to Disclose in Fischer II*

1. *The Third Circuit's Interpretation of ERISA's Fiduciary Duty to Disclose*

   In *Fischer I*, the court held that a plan administrator breaches its fiduciary duties under §1104(a) of ERISA by making affirmative material misrepresentations to plan participants about changes to an employee pension benefit plan or, "'[p]ut simply, when a plan administrator speaks, it must speak truthfully." 95 This "rule of truthfulness" focuses on the materiality of the plan administrator’s misrepresentation. 96 A misrepresentation is "material" if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. 97 The key factor in the materiality inquiry is the degree of seriousness with which the plan administrator is considering a particular change at the time the misrepresentation is made. 98

   Indeed, the "serious consideration" factor controls the materiality test; however, in *Fischer I*, the court failed to define this nebulous concept, yet remanded the case. On review, the court was dissatisfied with the district judge’s determination of when the employer’s consideration of the plan change became serious. 99 Therefore, in *Fischer II*, the court ex-

   95. *Fischer I*, 994 F.2d 130, 135 (3d Cir. 1993). In *Fischer I* and *Kurz I*, the Third Circuit assumed that individual breach of fiduciary duty claims were proper, but in neither case did the court discuss ERISA's text or provide justification for why individual claims for breach of fiduciary duty were proper. This development, however, was not confounding in light of *Bixler*, an earlier decision in which the court explained its position of allowing plan participants to seek individual relief for breaches of fiduciary duty. Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1298-1300 (3d Cir. 1993). For a discussion of this aspect of *Bixler*, see supra note 66 and accompanying text.

   96. See *Fischer I*, 994 F.2d at 135. As to the standard of review, the court stated that whether a communication to a plan participant constitutes an affirmative misrepresentation is a question of fact; however, the issue of liability for breach of fiduciary duty turns on whether the affirmative misrepresentation is material, which is a mixed question of law and fact. See id.

   97. See id.

   98. See id. ("All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality."). Several other circuits addressing this issue have agreed that "serious consideration" is the controlling standard. See Hockett v. Sun Co., Inc., 109 F.3d 1515, 1522-23 (10th Cir. 1997) (adopting serious consideration standard with regard to fiduciary duty imposed by ERISA to disclose potential plan changes); Maez v. Mountain States Tel. & Tel. Inc., 54 F.3d 1488, 1500-01 (10th Cir. 1995) (same); Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992) ("[T]he duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected employees."); Berlin v. Michigan Bell Tel., 858 F.2d 1154, 1163-64 (6th Cir. 1988) (holding that once employer gave "serious consideration" to implementing plan change, fiduciary had duty not to make misrepresentations concerning plan change).

   99. See *Fischer II*, 96 F.3d at 1536 ("We find the district court misunderstood the concept of 'serious consideration'").
2. **Balancing the Competing Interests in a Breach of the ERISA Fiduciary Duty to Disclose Claim**

In its rationale, the Third Circuit noted that the concept of serious consideration balances the tension between the employers' need to operate their businesses and the employees' right to information. The court recognized that operating a business requires developing strategies and evaluating options in the decision-making process. Because full disclosure at each step of the process would be impractical, the court requires disclosure only when consideration of a plan change becomes serious. The Third Circuit also applied the serious consideration formulation in the companion case to Fischer II. See Kurz v. Philadelphia Elec. Co., 96 F.3d 1544 (3d Cir. 1996) [hereinafter Kurz II]. Kurz II involved principally the same facts as Fischer II. See id. at 1547-48 (discussing factual background of case). The main factual differences between the cases were that the alleged breach of fiduciary duty in Kurz occurred in 1987 (prior to the alleged breach in Fischer II) and the alleged breach involved failures to disclose information regarding potential plan changes in response to employees' inquiries, rather than explicit denials (as in Fischer II). See id. at 1548-50.

100. *Id.* at 1539-43 (discussing "serious consideration" formulation and applying to facts). The Third Circuit also applied the serious consideration formulation in the companion case to Fischer II. See *Kurz* v. Philadelphia Elec. Co., 96 F.3d 1544 (3d Cir. 1996) [hereinafter *Kurz II*]. *Kurz II* involved principally the same facts as *Fischer II*. See *id.* at 1547-48 (discussing factual background of case). The main factual differences between the cases were that the alleged breach of fiduciary duty in *Kurz* occurred in 1987 (prior to the alleged breach in *Fischer II*) and the alleged breach involved failures to disclose information regarding potential plan changes in response to employees' inquiries, rather than explicit denials (as in *Fischer II*). See *id.* at 1548-50.

101. *See Fischer II*, 96 F.3d at 1539 (discussing balancing of interests in "serious consideration" standard); *see also Carleen*, supra note 3, at 36 (discussing serious consideration and stating that "[i]ts virtue is its consonance with the underlying principles of ERISA"). The court noted that it had recognized these competing interests in *Fischer I*. See *Fischer II*, 96 F.3d at 1539. The court recalled that it had based its holding on the employees' need for truthful information; however, it had also recognized a concomitant "right [of] an employer to make the business decision of how much and when to enhance pension benefits." *Id.* (quoting *Fischer I*, 994 F.2d at 133).

102. *See Fischer II*, 96 F.3d at 1539.

103. *See id.* (determining when disclosure is required under ERISA). The court noted that large corporations could not function if ERISA required full disclosure at each step of the decision-making process because various levels of corporate management regularly consider changes in their benefits packages as part of an ongoing process of cost-monitoring and personnel management. *See id.*

It is noteworthy that one district court, in a case that was factually similar to *Fischer I*, attacked the practicality of the serious consideration analysis on the same grounds. *See Bettis v. Thompson*, 932 F. Supp. 173, 175 (S.D. Tex. 1996). In *Bettis*, an employee heard rumors regarding the adoption of an early retirement plan and inquired about them. *Id.* The employee's supervisor did not know about an early retirement plan when the employee asked and refused to speculate regarding such a plan. *See id.* After the employee retired, the employer announced an early retirement plan. *See id.* In that court's view, "[t]he idea of imposing a fiduciary duty affirmatively not to mislead a beneficiary once a company has begun to take a plan into serious consideration is unworkable." *Id.* The court reasoned that because large corporations are "constantly considering [their] labor costs, determining whether [they] should reduce [their] number of employees, and deciding how best to compensate them," they cannot know when their consideration of plan changes has become "serious." *Id.* at 176. Therefore, the court held that the employer's only duty was to accurately explain to employees the current state of the pension plan then in effect. *See id.*
Conversely, the court recognized the employees' competing need for material information they can rely on when making employment decisions.\textsuperscript{104} Nevertheless, the court found that a standard requiring full disclosure at every step of the decision-making process could result in a mass of disclosures in which truly material information could easily be overlooked.\textsuperscript{105}

In balancing these competing interests, the Third Circuit recognized that ERISA does not impose a "duty of clairvoyance" on employers, which means that employers are not obligated to disclose precise predictions regarding future plan changes.\textsuperscript{106} Instead, employers are obligated to "answer participants' questions forthrightly, a duty that does not require the [employer] to disclose its internal deliberations."\textsuperscript{107}

In the same vein, one commentator noted that the imposition of a fiduciary duty to disclose plan changes that have not yet been adopted would disrupt the normal decision-making process of businesses and hamper their ability to achieve legitimate business goals unless the duty were strictly limited. \textit{See} Bintz, supra note 8, at 997. The commentator embellished this point:

A business that for competitive reasons finds it necessary to reduce its workforce should not be prevented from pursuing a business plan under which an initial early retirement or severance pay plan will be improved if a sufficient number of employees do not elect to retire or terminate employment. If an affirmative duty were imposed on fiduciaries to disclose such a plan of action, as suggested by the court in \textit{Drennan}, it would be impossible to implement. Few employees would elect retirement or terminate employment after being informed that improved benefits would become available if an insufficient number of employees elect to participate. \textit{Id.} Nevertheless, the commentator agreed that a limited duty is necessary to prevent employers from making material misrepresentations with respect to plan changes that are under serious consideration when responding to employee inquiries or at the employers' own initiative. \textit{See id.} at 997-98. The commentator, however, advocated the employers' option to decline to comment on the prospect of future changes and instead make generalized statements to the effect that the plan administrator always retains the right to amend the plan. \textit{See id.} at 998; \textit{see also} Barnes v. Lacy, 927 F.2d 541, 544 (11th Cir. 1991) (holding that employer did not breach duty by failing to notify employees of provision under which employer retained right to amend retirement plan). The commentator proposed that "[b]y permitting such disclosure, businesses will not be unduly discouraged from adopting or amending early retirement . . . plans, and participants' interests can be adequately protected from material misrepresentations that are intended to induce conduct that is contrary to their interests." \textit{See Bintz, supra} note 8, at 998.

\textsuperscript{104} \textit{See Fischer II}, 96 F.3d at 1539 (recognizing employees' need for important information).

\textsuperscript{105} \textit{See id.} ("The warning that a change was under serious consideration would become meaningless if cried too often.").

\textsuperscript{106} \textit{See id.} (discussing limitations on duty to disclose under ERISA).

\textsuperscript{107} \textit{Id.}
3. **Serious Consideration: The Appropriate Formulation**

"Serious consideration" forms the crux of the materiality inquiry. Serious consideration of a plan change exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change. The test is fact specific and no single factor is determinative. Similarly, the elements are not isolated criteria and "the three [elements] interact and coalesce to form a composite picture of serious consideration." One commentator asserted that conceptually, serious consideration seems to focus on "how" the employer works through the decision-making process.

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108. See id. at 1538 (emphasizing role of serious consideration in materiality inquiry).

109. See id. at 1539 (outlining elements for serious consideration of plan change).

110. See id. (declining to adopt bright-line rule); see also Kurz I, 994 F.2d 136, 139 (3d Cir. 1993) (noting that serious consideration cannot be tied to single objective event). In Kurz I, the employer argued that the benchmark for measuring "serious consideration" is when the plan change is formally proposed to the board of directors for discussion. Id. (citing Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988)). The court disagreed, but conceded that such a bright-line rule would be easier to administer than the Fischer I materiality standard. See id. Instead, the court noted that unfairness would result in some cases if it linked "serious consideration" to a single objective event. See id. As an example, the court cited Fischer I, in which the employer had sent a letter to all employees announcing that an early retirement plan would soon be proposed to the board of directors. See id. (citing Fischer I, 994 F.2d 130, 133 (3d Cir. 1993)). This voluntary notification would fail to satisfy serious consideration under the bright-line rule even though the event suggests that the employer believed that fairness dictated not only truthful representations to inquiring employees, but also disclosure of the plan without specific employee inquiry. See id.

111. Fischer II, 96 F.3d at 1539. The court explained this proposition: "Consistent with our decision in [Kurz I], this formulation does not turn on any single factor; the determination is inherently fact specific. Likewise the factors themselves are not isolated criteria; the three interact and coalesce to form a composite picture of serious consideration." Id.

112. See Carleen, supra note 3, at 96. This commentator noted that

[i]n theory, "serious consideration" appears to rest on a consideration of "how," not "whether." While an employer works through the preliminary steps of deciding whether to change a plan—in the court's words, "gathering information, developing strategies, and analyzing options"—it has no fiduciary duty to plan beneficiaries. General "discussion" also triggers no fiduciary duties. However, once an employer begins its "discussion for implementation"—that is, once "senior management" begin deciding how they will implement the change—fiduciary duties of truthfulness arise.

This theoretical distinction between "whether" and "how" is an extremely fine one in practice, however, and more than one employer will probably get caught on the wrong side of it. In this respect the unwary employer should understand that the test of Fischer and Kurz is far more complicated than it seems.

Id.
The first element requires "a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation." This element distinguishes serious consideration from preliminary phases of information gathering and strategy development. The specific proposal does not need to be in final form and it may contain several alternatives and differ somewhat from the plan that the employer ultimately implements.

The second element of serious consideration requires that the employer discuss the practicalities of implementing the plan change. This element further distinguishes serious consideration from the preliminary phases of information gathering and strategy formulation. Moreover, this factor protects the ability of senior management to participate in the preliminary phases without triggering a duty of disclosure. For example, senior management can order an analysis or comparative study of benefits alternatives without "seriously considering" implementing a plan change. Likewise, the court characterizes interaction among upper-level management, company personnel and outside consultants as preliminary.

113. Fischer II, 96 F.3d at 1540. The court considered the consulting firm's report as "an excellent example of a specific proposal" because "[the] document outlined various early retirement alternatives and served as a basis for management's deliberations." Id. at 1542.

114. See id. at 1540 ("A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage.").

115. See id. (discussing flexibility of "specific proposal" requirement). One commentator noted that "[w]hile serious consideration could occur before a proposal is cast in final form, and even when alternatives are on the table, general review or consideration of principles and philosophies would not meet the standard." Mark R. Hornak et al., Modifying Employee Benefits, NAT'L L.J., Feb. 24, 1997, at C6. Instead, the commentator noted, "[t]here must be a specific proposal that is concrete enough to support review and deliberation by senior management, not simply for the purpose of strategizing, but for implementation." Id.

Another commentator expressed that "a specific proposal" can include multiple proposals, hence "an employer need not have narrowed its options down to only one before serious consideration may have begun." Carleen, supra note 3, at 96. The commentator noted that the "specific proposal" in Fischer was a benefits consulting firm's report "that outlined various early retirement alternatives." Id.

116. See Fischer II, 96 F.3d at 1540 (discussing second element of serious consideration and outlining requirements). The court focused on the April 7, 1990 meeting at which senior management with the authority to implement the plan change was present. See id. at 1542. The court found that "[t]he subject of the meeting was corporate strategy, and meeting notes indicated that [the president] disclosed his intent to announce $100 million in cost cuts." Id. Hence, the court concluded, "[b]oth facts suggest that an early retirement plan was discussed for purposes of implementation at the April 7 meeting." Id.

117. See id. at 1540 (differentiating serious consideration from preliminary phases of decision-making process).

118. See id. (noting protective factor of second element).

119. See id.

120. See id. ("These discussions are properly assigned to the preliminary stages of company deliberations."). One commentator asserted that the second element
The final element requires that senior management with the authority to implement the plan change consider the proposal.\footnote{121} This element ensures that the serious consideration inquiry focuses upon "the proper actors within the corporate hierarchy."\footnote{122} Thus, as a general rule, the periodic review of benefits packages in the ordinary course of business and subsequent recommendations made by those involved in the review process will not constitute serious consideration.\footnote{123}

Instead, "senior management" is limited to those executives who possess the authority to implement proposed plan changes.\footnote{124} This focus on authority can be used to identify the "proper cadre of senior management," but it should not limit serious consideration to deliberations by the management body that literally has the power to implement changes in benefits packages, such as the board of directors.\footnote{125} Rather, it is sufficient that the plan be considered by those members of senior management with the responsibility for the "benefits area of the business" and who ultimately make recommendations to the board of directors regarding benefits operations.\footnote{126}

is "similarly treacherous" because serious consideration can begin even before the individuals working on the plan change know whether it will be adopted. See Carleen, supra note 3, at 36. The commentator noted that the president in Fischer had announced that he would consider an early retirement plan if the state utilities commission did not approve a rate increase. See id. The commentator observed that:

The rate increase was disapproved on April 19th, but the court held that "serious consideration" had begun on April 7th . . . . Similarly, in Kurz II, the court held that serious consideration had begun on the day a vice president asked the president and CEO to submit a recommendation to the board. The board, however, did not approve the measure until nearly a month later.

Id.

The commentator expressed that there may be long periods of time "during which a court will hold that serious consideration of a plan amendment has begun but during which even the fiduciaries involved will not know that the amendment will be adopted." Id. The commentator emphasized that adoption of the plan amendment may depend on some triggering event initiated by a third party, such as the PUC's rate increase in Fischer II or the board's approval in Kurz II. See id.

121. See Fischer II, 96 F.3d at 1540 (discussing third element of serious consideration formulation).

122. Id.

123. See id. (expressing that "[large corporations] employ individuals . . . to gather information and conduct reviews . . . . During the course of their employment, these employees . . . necessarily discuss their duties . . . . These discussions may include issues of implementation.").

124. See id. (defining "senior management").

125. See id. (differentiating between those who have technical power to implement changes in benefits packages—board of directors, for example—and those who have actual power to implement changes—senior management).

126. See id. (discussing members of senior management qualified to seriously consider plan changes).
4. Serious Consideration: Not a Bright-Line Rule

In Fischer II, the Third Circuit emphasized that it was not establishing a bright-line rule. In fact, the court noted that its approach "contrasts markedly" with the true bright-line rule adopted by the Second Circuit in Pocchia v. NYNEX Corp. In Pocchia, the Second Circuit adopted a bright-line rule establishing that a fiduciary has no duty to voluntarily disclose plan changes to employees who fail to request information about changes in benefits before such changes are adopted. Nevertheless, in this respect there seems to be no real tension between Fischer II and Pocchia. In Pocchia, the Second Circuit adopted a bright-line rule regarding employees who do not inquire about proposed changes, whereas in Fischer II, the Third Circuit adopted a fact-specific approach regarding employees who ask about proposed changes and are answered with misrepresentations.

127. Id. (declining to adopt bright-line rule with respect to serious consideration formulation). The court declined to articulate a standard of review for addressing the issue of serious consideration, leaving open the determination of whether this is a question of fact or law. See id. at 1541 n.3.

128. See id. at 1540 (citing Pocchia v. NYNEX Corp., 81 F.3d 275 (2d Cir.), cert. denied, 117 S. Ct. 302 (1996)).

129. See Pocchia, 81 F.3d at 278. For a discussion of the Pocchia decision, see supra note 62-64 and accompanying text.

130. See Pocchia, 81 F.3d at 278 (distinguishing Fischer I because it addressed breach of fiduciary duty to disclose within context of employees' requests for information, whereas Pocchia involved no such request). The Second Circuit, in dicta, suggested that had an employee inquired about the early retirement plan, the employer would have had a "fiduciary duty not to make affirmative material misrepresentations or omissions." Id. at 279. Although in a subsequent case, the Second Circuit expressed that "[w]hether a plan is under serious consideration is but one factor in the materiality inquiry." See Ballone v. Eastman Kodak Co., 109 F. 3d 117, 123 (2d Cir. 1997).

131. Compare Fischer I, 96 F.3d at 1539 ("[T]he [serious consideration] determination is inherently fact-specific."); with Pocchia, 81 F.3d at 278 (adopting bright-line rule that "a fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted"). The serious consideration standard has been accepted by several courts of appeals. See, e.g., Hockett v. Sun Co., Inc., 109 F.3d 1515, 1522-23 (10th Cir. 1997) (adopting serious consideration standard with regard to fiduciary duty imposed by ERISA to disclose potential plan changes); Maez v. Mountain States Tel. & Tel. Corp., 54 F.3d 1488, 1500-01 (10th Cir. 1995) (same); Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992) (same). Conversely, the serious consideration standard has been rejected, albeit implicitly, by two courts of appeals. See Porto v. Armco Inc., 825 F.2d 1274, 1276 (8th Cir. 1987) (rejecting existence of fiduciary duty to disclose beyond compliance with ERISA's express disclosure rules and, therefore, implicitly rejecting serious consideration standard); Stanton v. Gulf Oil Corp., 792 F.2d 432, 435 (4th Cir. 1986) ("It is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect."). Alternatively, the Second Circuit takes a hybrid approach: if an employee inquires about potential plan changes, the plan administrator has a "fiduciary duty not to make affirmative material misrepresentations or omissions." Pocchia, 81 F.3d at 279; see Mullins v. Pfizer Inc., 23 F.3d 663, 668-69 (2d Cir. 1994) (holding that plan fiduciary may not make affirmative material misrepresentations to plan participants regarding plan changes); see also Bal-
IV. PRACTICAL APPLICATION

*Fischer II* is the paramount decision in the Third Circuit’s ERISA fiduciary jurisprudence. Because the Supreme Court has denied certiorari to hear *Fischer II*, it seems the “serious consideration” formulation stands as good law. Hence, the practical significance of *Fischer II* is twofold. First, it provides the legal community with a framework for advising employers within the Third Circuit who are administering their employee benefit plans and contemplating potential plan changes while responding to employee inquiries about the possibility of such changes.132 Second, *Fischer II* leaves an unanswered question, namely, whether under the serious consideration analysis an employer has an affirmative duty to volunteer information regarding potential plan changes to employees who fail to inquire about such a possibility.133

A. Advising Employers

Because the Third Circuit’s holding in *Fischer II* applies to both denials and failures to disclose, the legal conclusion is that if beneficiaries ask about potential plan changes, plan fiduciaries must tell them whether the company is seriously considering plan changes even if the adoption of the change is still uncertain.134 As a practical matter, many employers who administer their employee benefit plans, in complying with ERISA’s requirement that they keep employees informed of all material plan provisions, commonly employ benefits counselors who are responsible for explaining the benefit plan to employees and answering their questions.135 Hence, a significant implication of the *Fischer II* holding is that these benefits counselors can bind the employer if they accurately explain the current benefits plan but fail to disclose potential changes of which they are not aware.136 Therefore, it is imperative that practitioners educate their clients within the Third Circuit who administer their employee

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132. See *Pocchia*, 81 F.3d at 278, for a discussion on advising employers, see infra notes 134-39 and accompanying text.

133. For a discussion of an issue not answered in *Fischer II*, whether ERISA fiduciaries have a duty to disclose information regarding potential plan changes under serious consideration to employees (or beneficiaries) who have not made inquiry, see infra notes 140-44 and accompanying text.


135. See Hornak et al., *supra* note 115, at C6 (postulating implications of imposition of fiduciary duty to disclose upon employer with many benefit plans at many diverse locations).

136. See *id.* (concluding that such implication “could bring the business of plan administration to a complete halt”).
benefit plans that they have an additional burden under *Fischer II* to instruct these benefits counselors not to answer any questions until they consult with the senior management—the level that seriously considers plan changes—to ensure that no plan changes are currently under serious consideration.\(^{137}\)

Additionally, the absence of a bright-line rule coupled with the Third Circuit’s adoption of a subjective, multi-factored test reduces the likelihood of summary adjudication of the serious consideration issue.\(^{138}\) Indeed, employers must adhere to the principles of clarity and consistency in communicating with employees regarding their benefit plans so that employers can avoid costly litigation. Finally, in light of the *Taylor* holding that nonfiduciary employees can bind plan administrators, it appears that employers can limit their liability by restricting the number of individuals who are authorized to speak with employees about the benefit plan.\(^{139}\)

**B. An Unanswered Question**

In the wake of *Fischer II*, an unanswered question remains under the serious consideration analysis regarding whether an employer has an affirmative duty to volunteer information regarding potential plan changes.

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137. *See id.* One commentator advised that those involved in plan administration also must receive specific instruction on how and when to respond to plan participants. Employers and sponsors must consider the degree to which they have disseminated information regarding what is contemplated—or, more importantly, what is not being contemplated—regarding plan changes. Those involved in the process must be trained to “issue spot” inquiries from participants and beneficiaries that could trigger disclosure requirements. *Id.*

138. *See id.* (discussing consequences of absence of bright-line rule). One commentator noted that when viewed in the context of other Third Circuit precedent, the *Fischer II* approach creates substantial uncertainty for plan administrators. *See id.* It seems likely that this commentator was referring to the issue of whether plan administrators have a duty to disclose plan changes under serious consideration to employees who have not inquired. *See id.* This issue is left unanswered in *Fischer II*, though there is language raising the issue in *Bixler* and Judge Weiner’s district court opinion. *See Fischer v. Philadelphia Elec. Co., Nos. CIV.A.90-8020, CIV.A 91-2771, 1995 WL 510300, at *2* (E.D. Pa. Aug. 22, 1995) (suggesting that employers may have affirmative duty to disclose information regarding potential plan changes even when employees do not request such information).

139. *See Hornak et al., supra* note 115, at C6 (discussing ways employers can limit their liability under ERISA). Additionally, one commentator advised:

Finally, the plan administrator of any benefit program should be someone other than the employer. As the [Third] Circuit held in *Taylor*, the employer-defendant was not liable for its manager’s statements because it was neither the plan administrator nor the fiduciary under ERISA, but liability could be triggered if that nonfiduciary employee was deemed an agent of the plan’s administrator. By assuring that authority is clearly communicated as residing only with the plan administrator, and not the employer’s benefits-related employees, liability, if asserted, may be limited to the ERISA-regulated plan administrator. *Id.*
if employees fail to inquire about such a possibility. Interestingly, when *Fischer I* was remanded, the district court, in dicta, expressed that there might be a duty to disclose prospective plan changes *even when the employee does not ask*; thus, a fiduciary may make a material misrepresentation by remaining silent. In *Fischer II*, although the Third Circuit did not address this issue, it expressly distinguished its approach from that of the Second Circuit in *Pocchia*. Likewise, because *Fischer II* only dealt with employees who had asked about plan changes, it remains uncertain how the Third Circuit would rule should this corollary issue come before it.

Nevertheless, from a practitioner’s perspective, one could claim breach of the fiduciary duty to disclose under ERISA when confronted with an affected retiree who assumed no plan changes were in the works

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140. *See Fischer*, 1995 WL 510300, at *2. Indeed, Judge Weiner addressed this issue explicitly:

> We also find that PECO was under an affirmative duty to inform those who did not ask about a pension plan sweetener in the pre-retirement interviews. As the court stated in *Bixler* the fiduciary has an obligation to convey complete and accurate information, "even if that information comprises elements about which the beneficiary has not specifically inquired." Accordingly, it is immaterial whether members of the class specifically solicited and were given incorrect information. So long as they retired after PECO began seriously considering a plan change and were not informed of this fact, they have prevailed on their claims.

*Id.* (quoting *Bixler* v. Central Pa. Teamster Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993)).


142. *Fischer II*, 96 F.3d at 1540 (failing to address whether employers have affirmative duty to disclose information regarding potential plan changes when employees do not request such information). This uncertainty is accentuated when considering the competing views that surrounded the *Fischer II* holding. One commentator interpreted *Fischer II* as standing for the proposition that "only changes that are being seriously considered must be disclosed to employees when asked." *Early Retirement Plan Guidance Provided by Third Circuit*, N.J. EMPLOYMENT L. LETTER (Pitney, Hardin, Kipp & Szuch, Brentwood, Tenn.), Dec. 1996, at 10 (emphasis added). In contrast, another commentator observed that

> [a]lthough the Second Circuit sought to distinguish the Third Circuit decision as one in which disclosure was necessary to alleviate participants’ confusion caused by the fiduciary’s prior statements, the Third Circuit holding could be viewed as imposing an additional affirmative duty to disclose the existence of a contemplated change to any participant whose interest might be adversely affected by the fiduciary’s silence. Taken together, these decisions raise the prospect of a split in the courts. Until the issue is resolved, a plan fiduciary’s prospects for success when sued on a “failure to disclose” claim may depend in large part upon where the suit is filed and whether the issue is implementation of a new program, as in the Second Circuit decision, or amendment of an existing program, as in the Third Circuit case.

and failed to inquire. Such a claim would not only be consistent with the foregoing, but it would also be consistent with the Third Circuit’s language in *Bixler* stating that the duty to disclose “entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.”

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143. See, e.g., *Bixler*, 12 F.3d at 1300 (expressing that ERISA fiduciary has affirmative duty to disclose information regarding potential plan changes). This is especially true in light of the fact that the court adamantly distinguished its approach from that of the Second Circuit. See *Fischer II*, 96 F.3d at 1540.

144. *Bixler*, 12 F.3d at 1300. At first glance, it may seem that *Bixler* stands for the proposition that an employer has a duty to disclose potential plan changes to employees who fail to inquire. Nevertheless, factually, *Bixler* did not involve alleged misrepresentations regarding potential plan changes to an employee benefit plan, rather, that case involved alleged misrepresentations regarding plan coverage. *Id.* at 1301-02. With this in mind, it is noteworthy that if the Third Circuit recognizes a breach of the fiduciary duty to disclose under ERISA when an employer does not disclose potential plan changes to employees who fail to inquire, it would not be novel. Indeed, such an approach tracks the District of Columbia Circuit’s ruling that “a fiduciary must convey complete and correct material information to a beneficiary.” *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990) (emphasis added). Expressing that this duty is not novel, the court quoted Judge Benjamin Cardozo: “‘A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word.’” *Id.* at 751 (quoting *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 121 N.E. 378, 380 (N.Y. 1918)).